Supreme Court, U.S.
FILED
SEP
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

NORM MALENG
King County Prosecuting Attorney

ANN SCHINDLER
Senior Deputy Prosecuting Attorney
Counsel of Record

Civil Division
E550 King County Courthouse
Seattle, Washington 98104
(206) 296-9015

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the decision of the Washington State Supreme Court that mere enactment of King County's wetland regulations did not constitute a taking is contrary to federal law.

2. Whether the decision of the Washington State Supreme Court that, absent any application for development permits, petitioner's claim that King County's wetland regulations inversely condemned its property was not ripe for adjudication is contrary to federal law.

3. Whether the Washington State Supreme Court's consideration of the entire parcel of property in analyzing petitioner's facial takings challenge to King County's wetland regulations was contrary to federal law.

4. Whether, in the absence of a final judgment on an application to develop petitioner's property, the Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PARTIES TO THE PROCEEDING

Petitioner is Presbytery of Seattle. Respondent King County is a municipal corporation and political subdivision of the State of Washington. It is a home rule charter county created pursuant to art. XI, § 4 of the Washington State Constitution with police power in unincorporated King County.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

REASONS WHY THE PETITION SHOULD BE DENIED 7

1. The decision of the Washington State Supreme Court is correct and does not conflict with any decision of this Court, other state courts of last resort or United States Court of Appeals 7

2. The Washington court's analysis of petitioner's regulatory takings challenge in relation to the entire parcel of property is consistent with federal precedent 10

3. In the absence of a final judgment on an application, the Supreme Court does not have jurisdiction to determine the constitutionality of the application of King County's wetland ordinances 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 8, 9, 11

Allingham v. Seattle, 109 Wn.2d 947, 749 P.2d 160 (1988) 5, 11

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 12

Hodel v. Irving, 481 U.S. 704 (1987)..... 11

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981)..... 9

Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987) 9, 10, 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11

MacDonald, Sommer & Frates v. Yolo Cty., 477 U.S. 340 (1986).....9, 10, 12

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 12

Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988) 11

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130 (1978) 10, 11

Pennell v. City of San Jose, 108 S. Ct. 849 (1988)..... 9

Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990).....1, 6, 7, 11

TABLE OF AUTHORITIES – Continued

Page

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981) 12

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 10

CONSTITUTION, STATUTES, REGULATIONS, AND ORDINANCES:

Fifth and Fourteenth Amendments to the United States Constitution 2, 7, 12

28 U.S.C. § 1257(a) ..... i, 2, 12

Art. XI, § 4 of the Washington State Constitution ii

Washington State Environmental Policy Act Chapter 43.21C Revised Code of Washington 2, 3

King County Ordinance 4365; Special Control Areas and Flood Hazard Areas (sensitive areas ordinance) 2, 3

King County Ordinance 7746; 1986 Federal Way Community Plan and Area Zoning Update 2, 3, 4

King County Code 21.54 3

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the Washington State Supreme Court is reported at 114 Wn.2d 320, 787 P.2d 907 (1990). Pet. App. A. The decision of the Washington State Court of Appeals, Division I, is an unpublished decision. Pet. App. B.

JURISDICTION

The petition for writ of certiorari was filed on August 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). To the extent petitioner seeks review of the application of King County's wetland regulations to its property, the Supreme Court lacks jurisdiction. No Washington court has rendered a final decision that any taking in violation of the federal or state constitutions has or has not occurred.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions are the Fifth and Fourteenth Amendments to the United States Constitution. Pet. 2.

The wetland regulations at issue are the Washington State Environmental Policy Act, Chapter 43.21C Revised Code of Washington, App. 1-12; King County Ordinance 4365, Special Control Areas and Flood Hazard Areas (sensitive areas ordinance), App. 19-24; King County Ordinance 7746, the Federal Way Community Plan and Area Zoning Update, App. 27-34; Pet. App. E-1-8.

STATEMENT OF THE CASE

The Washington State Environmental Policy Act, chapter 43.21C Revised Code of Washington, was enacted by the Washington State Legislature in 1971 to protect the environment. App. 1-12.

In 1978 petitioner purchased a single family home located on four and one-half acres in the Federal Way area in King County for $60,000. At the time of purchase, the Hylebos Wetland No. 18, a class 1 rated unique and outstanding wetland, occupied approximately one-third of this property. It is a wetland of major environmental significance. App. 48-52; Pet. App. A-2-3.

In 1979 King County amended its sensitive areas ordinance, King County Code 21.54, to define areas of special concern, implement the policies of the State Environmental Policy Act of 1971 and ensure protection of environmentally sensitive areas. King County Ordinance 4365; App. 19-24. Wetlands are of special environmental concern and are protected by the state and King County. App. 14. Both the State Environmental Policy Act (SEPA) and King County's sensitive areas ordinance are an overlay to existing statutory authority and require analysis and consideration of environmental impacts. The purpose of King County's sensitive areas ordinance is specifically "to supplement the development requirements contained in the various use classifications." App. 17; 20. SEPA requires King County to analyze the environmental impacts of a proposal and authorizes King County to impose conditions or to deny approval on the basis of significant adverse environmental impacts. App. 3-7.

In 1980 the King County Council adopted the Federal Way Revised Community Plan and Area Zoning.[1] The

---

[1] For comprehensive planning and zoning purposes, King County is divided into thirteen planning areas. Federal Way is

(Continued on following page)

1980 Federal Way Revised Community Plan and Area Zoning changed the zoning on petitioner's property from SR (Suburban Residential) to SE-P (Suburban Estates with development conditions). The SE zone allows churches as non-residential uses but limits the area of the lot that can be used for this purpose. App. 35-37; 39-47. The development conditions imposed by the 1980 plan were specifically designed to protect Hylebos Wetland No. 18. App. 14-16; 25-26.

In 1981, pursuant to King County's sensitive areas ordinance, King County conducted an inventory of the wetlands located in the western one-half of King County. The Hylebos Wetland No. 18 was rated a class 1 unique and outstanding wetland in King County's wetland inventory. Wetlands are rated class one if there is the presence of species recognized by the federal government or the State of Washington as endangered and the wetland is a sensitive and outstanding potential habitat for such species. App. 49-51. Hylebos Wetland No. 18 is approximately 12,000 years old, and is a complex wetland system containing an old growth cedar bog. It is one of the last major wetlands in Federal Way and is of major environmental significance in King County. Its ecosystem is critical to the maintenance and function of fish and wildlife. App. 50-52.

(Continued from previous page)

one of these planning areas. It covers approximately 22,000 acres and has a population of approximately 78,000. King County has adopted a community plan and area zoning for each of its thirteen planning areas to amplify and augment the County's comprehensive planning zoning. These community plans and area zoning are updated periodically in order to make allowances for population growth and other changing conditions.

In 1986 King County adopted another update of the Federal Way Community Plan and Area Zoning. It did not change the 1980 zoning designation on petitioner's property. The only change was to replace the previous development conditions imposed to protect the Hylebos Wetland No. 18 with new ones. These development conditions apply to all properties that are adjacent to or contain the Hylebos Wetland. App. 16; 27-34; 53. The conditions first require that wetland studies pursuant to King County's sensitive areas ordinance be prepared, that the wetland edge be identified, and that a wetland buffer to protect the environmental integrity of the Hylebos Wetland system be created. Other conditions relate to proposed alteration, restoration, water quality and protection requirements. Condition 4 prohibits the creation of building lots in the Hylebos Wetland. App. 16; 27-34; 53.

Having never applied for a permit to develop its property in any fashion, Presbytery sued King County alleging that King County's wetland regulations prevented it from using its land to build a church and parking lot or for any other economically reasonable or profitable use. Pet. App. F-1. Presbytery moved for partial summary judgment asking the court to rule that King County had inversely condemned its property. In support of its motion, petitioner relied on a theoretical residential subdivision development prepared by its expert. Pet. App. G-2; App. 18; 53-55. Based on *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988), Presbytery argued that exhaustion of King County's administrative remedies would be futile and that a significant portion of its property had been converted by King County's ordinance to open space, which required just compensation.

In support of its cross-motion to dismiss the suit, King County presented evidence that a church and parking lot could be built on the property under King County's zoning code even with the wetland and that resort to the permit process was not futile because King County allows development in wetlands where application of its wetland ordinances "would deny all reasonable uses of the property." App. 24. The evidence presented indicated King County would be receptive to a development proposal that takes into consideration valid environmental concerns for the Hylebos Wetland. App. 17-18. Presbytery's theoretical residential subdivision development was flawed by the assumption that the Hylebos Wetland No. 18 did not exist on the property and a maximum number of building lots could be achieved by filling and building in the wetland. The more intensive residential subdivision development of the property posited by petitioner's expert would, in all likelihood, given the pre-existing wetland, be subject to review under SEPA and King County's wetland regulations. App. 17-18.

The trial court dismissed petitioner's lawsuit solely on the ground that it failed to exhaust its administrative remedies. In an unreported decision, Division I of the Court of Appeals affirmed the trial court's dismissal of petitioner's lawsuit on the ground that Presbytery's claims were not ripe for adjudication. Pet. App. B.

The Washington State Supreme Court upheld the decisions of the trial court and the Court of Appeals. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990). The holding of the Washington Supreme Court in *Presbytery* is very limited and narrow. The court held (1) that Presbytery had not carried its burden of

showing that the enactment of King County's wetland regulations had denied it all economically viable use of its property and (2) that Presbytery's claim that King County's regulations as applied was an unconstitutional taking was not ripe for adjudication until an application of a developmental proposal had been pursued and finally determined. Pet. App. A-17-23.

SUMMARY OF ARGUMENT

The Washington State Supreme Court's decision in *Presbytery of Seattle*, 114 Wn.2d 320, 787 P.2d 320 (1990) is consistent with federal law. To the extent the court engaged in any discussion arguably contrary to federal law, it played no role in the court's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision of the Washington State Supreme Court is correct and does not conflict with any decision of this Court, other state courts of last resort or United States Court of Appeals.

Contrary to petitioner's assertions, the Washington court did not reject its compensation claim. The court did not decide that petitioner was not entitled to compensation due to its failure to surmount some threshold inquiry. The Washington court did not decide whether application of King County's regulations to petitioner's property was a taking in violation of the Fifth and Fourteenth Amendments. The entire focus of the petition for

writ of certiorari is dicta in which the Washington court articulates but does *not* apply the relative applicability, standards, and remedies of the taking and substantive due process limitations. The court's dicta did not govern the holding of the case. The court held (1) that petitioner failed to carry its burden of proving that the enactment of King County's wetland regulations did not substantially advance legitimate state interests or deny economically viable use of its property and (2) that petitioner's taking challenge was not ripe for adjudication.

The decision of the Washington court that petitioner had not successfully carried its burden of showing that King County's adoption of wetland regulations constituted a taking is consistent with federal law.[2] Since it is undisputed that petitioner has never applied to develop its property for a church or any other use, the Washington court only considered petitioner's constitutional challenge to the enactment of its wetland regulations. Pet. App. A-14, A-18-19.

Using the exact standards set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Washington court concluded, based on the record, that King County's regulations substantially advanced legitimate state interests and "that the landowner has not carried the burden of showing that the regulation denies it all economically viable use of any parcel of regulated property." Pet. App. A-19. The evidence presented by King County clearly established the ecological and environmental significance of

---

[2] The Washington court's decision is also consistent with the state court and United States Court of Appeals cases cited by petitioner. Pet. 16-17.

seeking to protect significant wetlands and that it was receptive to considering proposals for development. App. 48-55; 17-24. The Washington court's conclusion is consistent with federal law. *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980).[3]

The Washington court's decision that petitioner's constitutional challenge to the application of King County's regulations was not ripe for adjudication is also consistent with federal law.

A number of factors must be analyzed in order to determine the economic effect that regulations have on the property and an owner's reasonable investment-backed expectations with respect to the property in an "as applied" takings challenge. Given the nature of this inquiry, whether a regulatory taking has occurred is a question that cannot be made without a final decision as to how the challenged regulations apply to the landowner's property. *MacDonald, Sommer & Frates v. Yolo*

---

[3] The Washington court entertained petitioner's facial challenge to King County's regulations without requiring exhaustion of administrative remedies. *Keystone*, 480 U.S. 47 (1987); *Hodel v. Virginia Surface Mining*, 452 U.S. 264 (1981). In the recent case of *Pennell v. City of San Jose*, 108 S. Ct. 849 (1988), the Court rejected as premature a facial regulatory taking challenge to a rent-control ordinance. The Court held the facial challenge was non-justiciable without a final decision of the regulatory burden imposed. Thus, even though the Supreme Court may have required exhaustion of administrative remedies, the Washington Supreme Court was not as strict and did not.

Cty., 477 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limited." *MacDonald, Sommer & Frates*, 477 U.S. at 351 (1986).

The Washington court affirmed the conclusion of the trial court and the court of appeals that petitioner's claim was not ripe for adjudication. "Because the landowner has not yet sought any development permits, it is not possible to know what effect SEPA and other applicable regulations might have on the property in question." Pet. App. A-22. This holding is consistent with federal law. *Keystone*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates*, 477 U.S. 340 (1986); *Williamson County*, 473 U.S. 172 (1985).

2. The Washington court's analysis of petitioner's regulatory takings challenge in relation to the entire parcel of property is consistent with federal precedent.

The principle that a constitutional taking challenge should be determined by evaluating the parcel as a whole was reaffirmed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978), and definitively explained in *Keystone*, 480 U.S. 470, 488-502 (1987).[4]

---

[4] " 'Taking' jurisprudence does not divide a single parcel into discrete segments and and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130.

(Continued on following page)

Washington regulatory taking decisions have consistently followed this principle. *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988).[5] The Court has not analyzed regulatory taking challenges by only looking at the regulated portion of the property. *Keystone Bituminous Coal Assoc. v. DeBenedictis; Penn Central Transportation Co. v. New York City.*

The cases petitioner relies on, *Hodel v. Irving*, 481 U.S. 704 (1987) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), use different criteria than regulatory taking cases that restrict development. In these cases, which concern regulations that deprive an owner of a fundamental attribute of ownership or a physical occupation of property, no exhaustion of administrative remedies is required and no economic analysis is necessary. *Hodel v. Irving*, 481 U.S. 704 (1987); *Loretto v.*

(Continued from previous page)

In *Keystone*, the Court stated that "Although these verbal formulations do not solve all the definitional issues that may arise and define the relevant mass of property, they do provide sufficient guidance to compel us to reject petitioner's argument" and that its "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of rights." *Keystone*, 480 U.S. at 497, 500.

[5] *Allingham v. City of Seattle*, 109 Wn.2d 947, 749 P.2d 169, *modified*, 757 P.2d 533 (1988), was an exception that was explicitly overruled in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990). In *Allingham* the test of *Agins v. City of Tiburon* was restated to mean deprivation of any profitable use of "a substantial portion" of the land. *Allingham*, 109 Wn.2d at 952. The Washington court took the opportunity in *Presbytery of Seattle v. King County* to unanimously overrule this analysis and reiterate its adherence to federal law. Pet. App. A-15-16.

Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (Stevens, J., dissenting). On the other hand, regulations that restrict the use and development of property require an economic analysis in order to determine the nature of the use, the economic effect that the regulations would have on the value of the property and on the owner's reasonable investment-backed expectations with respect to the property.[6]

3. In the absence of a final judgment on an application, the Supreme Court does not have jurisdiction to determine the constitutionality of the application of King County's wetland ordinances.

28 U.S.C. § 1257(a) grants jurisdiction to the Supreme Court to review final judgments. There has been no final decision as to whether application of King County's regulations to petitioner's property violated the Fifth and Fourteenth Amendments. Since there has been no application to develop the property, there is no final judgment. The court lacks jurisdiction to decide the constitutionality of the application of King County's ordinances to petitioner's property. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981); *MacDonald, Sommer & Frates*, 477 U.S. 340 (1986).

---

[6] Petitioner also cites and relies on *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The court in *Nectow* held that the zoning ordinances applied to plaintiff's land violated substantive due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: September 1990.

Respectfully submitted,

NORM MALENG
King County Prosecuting
Attorney

ANN SCHINDLER
Senior Deputy Prosecuting
Attorney
Attorneys for Respondent
King County

APPENDIX A

Chapter 43.21C RCW
STATE ENVIRONMENTAL POLICY

RCW 43.21C.010 Purposes. The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation. [1971 ex.s. c 109 § 1.]

RCW 43.21C.020 Legislative recognitions – Declaration – Responsibility. (1) The legislature, recognizing that man depends on his biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (a) Foster and promote the general welfare; (b) to create and maintain conditions under which man

and nature can exist in productive harmony; and (c) fulfill and social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. [1971 ex.s. c 109 § 2.]

RCW 43.21C.030 Guidelines for state agencies, local governments – Statements – Reports – Advice – Information. The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions, significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the world-wide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions,

and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects. [1971 ex.s. c 109 § 3.]

RCW 43.21C.031 Significant impacts. An environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. Actions categorically exempt under RCW 43.21C.110(1)(a) do not require environmental review or the preparation of an environmental impact statement under this chapter.

An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant. Beneficial environmental impacts may be discussed. The responsible official shall consult with agencies and the public to identify such impacts and limit the scope of an environmental impact statement. The subjects listed in RCW 43.21C.030(2)(c) need not be treated as separate sections of an environmental impact statement. Discussions of significant short-term and long-term environmental impacts, significant irrevocable commitments of natural resources, significant alternatives including mitigation measures, and significant environmental impacts which cannot be mitigated should be consolidated or included, as applicable, in those sections of an environmental impact statement where the responsible official decides they logically belong. [1983 c 117 § 1.]

* * *

RCW 43.21C.060 Chapter supplementary – Conditioning or denial of governmental action. The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter: *Provided,* That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decisionmaker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact. Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a

legislative decision, is conditioned or denied by a non-elected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency. [1983 c 117 § 3; 1977 ex.s. c 278 § 2; 1971 ex.s. c 109 § 6.]

RCW 43.21C.075 Appeals. (1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.

(3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

(a) Shall not allow more than one agency appeal proceeding on a procedural determination (the adequacy

of a determination of significance/nonsignificance or of a final environmental impact statement), consistent with any state statutory requirements for appeals to local legislative bodies. The appeal proceeding on a determination of significance/nonsignificance may occur before the agency's final decision on a proposed action. Such an appeal shall also be allowed for a determination of significance/nonsignificance which may be issued by the agency after supplemental review;

(b) Shall consolidate appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) by providing for simultaneous appeal of an agency decision on a proposal and any environmental determinations made under this chapter, with the exception of the threshold determination appeal as provided in (a) of this subsection or an appeal to the local legislative authority under RCW 43.21C.060 or other applicable state statutes;

(c) Shall provide for the preparation of a record for use in any subsequent appeal proceedings, and shall provide for any subsequent appeal proceedings to be conducted on the record, consistent with other applicable law. An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript. An electronically recorded transcript will suffice for purposes of review under this paragraph; and

(d) Shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal

procedure, such person shall, prior to seeking any judicial review, use such procedure if any such procedure is available, unless expressly provided otherwise by state statute.

(5) RCW 43.21C.080 establishes an optional "notice of action" procedure which, if used, imposes a time period for appealing decisions under this chapter. Some statutes and ordinances contain time periods for challenging governmental actions which are subject to review under this chapter, such as various local land use approvals (the "underlying governmental action"). This section does not modify any such time periods. This section governs when a judicial appeal must be brought under this chapter where a "notice of action" is used, and/or where there is another time period which is required by statute or ordinance for challenging the underlying governmental action. In this subsection, the term "appeal" refers to a judicial appeal only.

(a) If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be commenced within thirty days. The agency shall give official notice stating the date and place for commencing an appeal. If there is an agency proceeding under subsection (3) of this section, the appellant shall, prior to commencing a judicial appeal, submit to the responsible official a notice of intent to commence a judicial appeal. This notice of intent shall be given within the time period for commencing a judicial appeal on the underlying governmental action.

(b) A notice of action under RCW 43.21C.080 may be used. If a notice of action is used, judicial appeals shall be commenced within the time period specified by RCW

43.21C.080, unless there is a time period for appealing the underlying governmental action in which case (a) of this subsection shall apply.

(c) Notwithstanding RCW 43.21C.080(1), if there is a time period for appealing the underlying governmental action, a notice of action may be published within such time period.

(6)(a) Judicial review of an appeal decision made by an agency under RCW 43.21C.075(5) shall be on the record, consistent with other applicable law.

* * *

(c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

(7) Jurisdiction over the review of determinations under this chapter in an appeal before an agency or superior court shall upon consent of the parties be transferred in whole or part to the shorelines hearings board. The shorelines hearings board shall hear the matter and sign the final order expeditiously. The superior court shall certify the final order of the shorelines hearings board and said certified final order may only be appealed to an appellate court.

(8) For purposes of this section and RCW 43.21C.080, the words "action", "decision", and "determination" mean substantive agency action including any accompanying procedural determinations under this chapter (except where the word "action" means "appeal" in RCW 43.21C.080(2) and (3)). The word "action" in this section and RCW 43.21C.080 does not mean a procedural determination by itself made under this chapter. The

word "determination" includes any environmental document required by this chapter and state or local implementing rules. The word "agency" refers to any state or local unit of government. The word "appeal" refers to administrative, legislative, or judicial appeals.

(9) The court in its discretion may award reasonable attorney's fees of up to one thousand dollars in the aggregate to the prevailing party, including a governmental agency, on issues arising out of this chapter if the court makes specific findings that the legal position of a party is frivolous and without reasonable basis. [1983 c 117 § 4.]

* * *

RCW 43.21C.135 Authority of local governmental units to adopt rules, guidelines and model ordinances by reference. (1) All public and municipal corporations, political subdivisions, and counties of the state are authorized to adopt rules, ordinances, and resolutions which incorporate any of the following by reference to the appropriate sections of the Washington Administrative Code:

(a) Rules and guidelines adopted under RCW 43.21C.110(1) in accordance with the administrative procedure act, chapter 34.04 RCW;

(b) Model ordinances adopted by the department of ecology under RCW 43.21C.130 in accordance with the administrative procedure act, chapter 34.04 RCW.

(2) If any rule, ordinance, or resolution is adopted by reference pursuant to subsection (1) of this section, any publication of such rule, ordinance, or resolution shall be accompanied by a summary of the contents of the sections of the Washington Administrative Code referred

to. Such summaries shall be provided to the adopting units of local government by the department of ecology: *Provided,* That any proposal for a rule, ordinance or resolution which would adopt by reference rules and guidelines or model ordinances pursuant to this section shall be accompanied by the full text of the material to be adopted which need not be published but shall be maintained on file for public use and examination.

(3) Whenever any rule, ordinance, or resolution is adopted by reference pursuant to subsection (1) of this section, the corporation, political subdivision, or county of the state adopting the rule, ordinance, or resolution shall maintain on file for public use and examination not less than three copies of the sections of the Washington Administrative Code referred to. [1975-'76 2nd ex.s. c 99 § 1.]

APPENDIX B

SUMMARY JUDGMENT MOTION SET FOR:
Wednesday, April 20, 1988

SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, A Washington corporation Plaintiff, v. KING COUNTY, Defendant.	)	NO. 87-2-07034-4 AFFIDAVIT OF BRYAN GLYNN
STATE OF WASHINGTON COUNTY OF KING	)	ss.

Bryan Glynn, being first duly sworn on oath deposes and states as follows:

1. I am the Manager of the Building and Land Development Division and I make this affidavit on my own personal knowledge.

2. As the Manager of the Building and Land Development Division (hereinafter "BALD") I am responsible for the administration of the County building, housing, fire, energy, shoreline, zoning and subdivision codes and the issuance of land development permits. One of the important functions of BALD is to administer the land development permitting process, including the intake,

review and issuance of permits pursuant to adopted laws and policies.

3. I have reviewed the complaint for damages for inverse condemnation filed in Presbytery of Seattle v. King County, King County Superior Court Cause No. 87-2-07034-4 and the Declaration of R. W. Thorpe, particularly attachments B and C. In addition I have reviewed the BALD records to ascertain whether Presbytery of Seattle has made any application for development for the property described in its complaint for damages for inverse condemnation.

4. On part of the property that is the subject of this lawsuit is the Hylebos Wetland No. 18. The wetland is a Class 1 unique and outstanding wetland. Wetlands are of special environmental concern and are protected by both the state through the State Environmental Policy Act, RCW 43.21C, and the County through its sensitive areas ordinance, King County Code 21.54. Exhibit 1. SEPA was enacted in 1971 and the sensitive areas ordinance in 1979. Both SEPA and the sensitive areas ordinance would have applied to any development on plaintiff's property before 1980. A review of the Kroll map, an index of all property in King County, indicates that the Hylebos Wetland No. 18 is on approximately one-third of Presbytery of Seattle's property.

5. In 1980 the King County Council adopted the Federal Way Revised Community Plan and Area Zoning. It changed the zoning on plaintiff's property from SR (suburban residential) to SE-P. The SE-P zoning desigation [sic] means this property is classified as suburban estate with development conditions to protect Hylebos

Wetland No. 18. An SE zoning designation allows single family residential and other uses including churches. Exhibits 4 and 5. According to the 1980 plan, the P-suffix development conditions were adopted:

> Because of the size and significance of the west Hylebos headwater wetland, a policy of the revised Federal Way Community Plan requires site plan review for any development within the rectangular area bounded by Pacific Highway South on the East, 348th Street South on the North, 1st Avenue South on the West and 356th Street South on the South.

In the 1980 Federal Way Community Plan and Area Zoning the following P-suffix site development conditions were adopted to protect the Hylebos wetlands and apply to all development pursuant to the 1980 Federal Way Community Plan and Area Zoning:

> 1. 200 foot setback from the main January high water mark or plus 10 feet elevation above the main January high water mark, whichever is greater.
>
> 2. Natural vegetation within setback area to be kept.
>
> 3. No fill below the 210 foot contour line.
>
> 4. No sewer facilities, including lines serving adjacent areas, within areas defined by the January high water mark.
>
> 5. Development upland of 210 foot contour line to use holding ponds and catch basins to keep run off peak to current level and to trap pollutants. These ponds and catch basins shall either be sufficiently biologically active to biodegrade the pollutants, or be periodically cleaned.

The adopted policies that were the basis for the 1980 plan also required that special studies be prepared pursuant to King County's sensitive areas ordinance. Exhibit 2, Federal Way Revised Community Plan and Area Zoning, pages 54 and 55.

6. In 1986 the King County Council adopted the updated Federal Way Community Plan and Area Zoning. The zoning on Presbytery's property continued to be the same; SE-P. The only change was to replace the wetland-related development conditions established in 1980 with the wetland protection conditions established during the plan update and adopted by Federal Way Community Plan and Area Zoning, Ordinance 7746 on September 2, 1986. The 1986 Hylebos Wetland No. 18 development conditions were adopted to protect the Hylebos Wetland and apply to all development on this site. Exhibit 3, 1986 Federal Way Community Plan and Area Zoning, pages 4 to 11. The first three development conditions require that wetland studies be prepared and the wetland edge identified for all developments that would potentially impact Hylebos Wetland No. 18.

The wetland boundary edge identified in the Federal Way Community Plan and Area Zoning is clearly an approximate line. Until a study is done and the wetland edge marked and identified on a given site by BALD's wetland planner (or an approved properly qualified consultant), it is not clear where the wetland is and where the 100 foot buffer would be. To my knowledge, no such studies have been done on this property. R. W. Thorpe's representation of the wetland boundaries on this property in his attachment C are not based on BALD's analysis or review as required by King County's ordinances.

7. In addition to the application of the Federal Way Community Plan and Area Zoning development conditions to protect the Hylebos Wetland, King County's sensitive areas ordinance, King County Code 21.54, King County's environmental procedures, King County Code 20.44, and the State Environmental Policy Act (SEPA) RCW 43.21C, must be applied to any development on this property. The SE-P classification is construed in the context of King County's sensitive areas ordinance and the State Environmental Policy Act. The purpose of King County's sensitive areas ordinance is specifically "to supplement the development requirements contained in the various use classifications". The purpose of the state mandated State Environmental Policy Act is to protect the environment. SEPA requires King County to analyze the environmental impacts of a proposal and make a threshold determination of significance before any action can be taken. If a determination is made that the project would have significant environmental impacts, an environmental impact statement must be prepared. SEPA authorizes King County to impose conditions or deny approval on the basis of significant environmental impacts.

8. To my knowledge there has been no application made by Presbytery of Seattle to develop its property for a church or any other purpose. BALD has not, therefore, had the opportunity to apply the development conditions as required by the Federal Way Community Plan and Area Zoning and do a wetland study, identify the wetland edge or buffer, and apply the conditions and King County Code 21.54. Nor has any application been subjected to a SEPA determination. Without doing so, BALD is not in a position to determine the effect of SEPA, the

Federal Way Community Plan and Area Zoning and King County Code 21.54 on this property.

9. According to Presbytery of Seattle's complaint this property was acquired for the purpose of building a church. Even though no application for such development has been made, a church and parking lot could potentially be built pursuant to King County's zoning code. Exhibits 4 and 5; King County Code 21.18 and 21.08.

10. Mr. Thorpe's basic assumption in his declaration and theoretical building scheme seems to be that this site consists of dry, buildable land. This assumption ignores the existence of Hylebos Wetland No. 18 on the property. Given the existing environmental condition it is certainly clear that the maximum number of building lots under the zoning code could not be achieved. Moreover, in all likelihood, in order to carry out Mr. Thorpe's scheme of five building sites Hylebos Wetland No. 18 would be adversely affected contrary to SEPA, King County's sensitive areas ordinance, and Ordinance 7746. King County is mandated by the state and its own ordinances to protect wetlands; not to allow them to be altered to maximize development potential.

11. Before the adoption of Ordinance 7746, the development conditions of the previous Federal Way Community Plan and Area Zoning, SEPA, and the sensitive areas ordinance applied to plaintiff's property. It is not clear that plaintiff's ability to develop its property has been affected at all by the adoption of Ordinance 7746. However, without an application being filed and reviewed BALD cannot make a determination about this.

/s/ Bryan Glynn
BRYAN GLYNN

SUBSCRIBED AND SWORN to before me this 12th day of April, 1988.

/s/ Ann Schindler
Notary Public in and for the State of Washington, residing at Kitsap County
My Commission Expires: June 1988.

EXHIBIT 1

* * *

Chapter 21.54
SPECIAL CONTROL AREAS AND FLOOD HAZARD AREAS

Sections:

21.54.010 Purpose.
21.54.020 Regulations subject to chapter.
21.54.030 Maps adopted.
21.54.040 Interim flood hazard areas.
21.54.050 Flood hazard area – Purpose.
21.54.060 Limitation on uses in floodway.
21.54.070 Limitation on uses in floodway fringe.
21.54.080 Permits and licenses – Approval required.
21.54.090 Permits and licenses – Procedural requirements.
21.54.100 Permits and licenses – Appeal from decision.
21.54.110 Authority.

21.54.120 Information to be obtained and maintained.
21.54.130 Sensitive areas – Purpose.
21.54.140 Sensitive areas – Mapping.
21.54.150 Sensitive areas – Permit issuance.
21.54.160 Sensitive areas – Class III landslide hazard area.
21.54.170 Sensitive areas – Wetlands.
21.54.180 Sensitive areas – Coal mine hazard area – Restrictions.
21.54.190 Sensitive areas – Coal mine hazard area – Additional provisions.

21.54.010 Purpose. The purpose of this general provision is to determine areas of special concern and to supplement the development requirements contained in the various use classifications by providing for additional controls in critical areas where public safety requires or where planned development is necessary. (Ord. 1527 § 1, 1973).

21.54.020 Regulations subject to chapter. The foregoing regulations of this title pertaining to the several classifications shall be subject to the general provisions, conditions and exceptions contained in this chapter. (Ord. 1527 § 2, 1973).

21.54.030 Maps adopted. Areas of special concern may be shown and defined on zoning maps which shall become a part of this title by adoption by the county council subject to the provisions of Chapters 21.60 and 21.62. (Ord. 1527 § 3, 1973).

* * *

21.54.130 Sensitive areas – Purpose. King County has areas of special concern in addition to the flood hazard

areas as defined in Section 21.04.148 and this chapter, which together comprise sensitive areas. The purposes of Sections 21.54.130 through 21.54.180 are:

A. To protect sensitive areas by regulating their development;

B. To protect the public from damage due to landslide, subsidence, or erosion;

C. To minimize turbidity and pollution of wetlands and fish-bearing waters and to maintain wildlife habitat;

D. To protect the public against avoidable losses from:

1. Maintenance and replacement of public facilities,
2. Property damage,
3. Subsidy cost of public mitigation of avoidable impacts,
4. Cost for public emergency rescue and relief operations;

E. To alert appraisers, assessors, owners, potential buyers and lessees of the natural limitations of the sensitive areas;

F. To provide responsible officials with information to condition or deny public or private projects to protect sensitive areas; and to avoid the necessity of preparing environmental impact statements in cases where there will not be significant adverse environmental effects, thus expediting governmental approval processes;

G. To protect unique, fragile and valuable elements of the environment;

H. To implement the policies of the State Environmental Policy Act of 1971. (Ord. 4365 § 8, 1979).

21.54.140 Sensitive areas – Mapping. The distribution of environmentally sensitive areas in western King

County is displayed in maps published by the department of planning and community development in the Sensitive Areas Map Folio, as now or hereafter updated and supplemented. These maps are adopted by reference and shall be used by the department to alter the public and responsible officials to the potential presence of sensitive areas on the sites of development proposals. In cases of a mapping error, the actual presence or absence of the features defined in KCC 21.04 as sensitive areas, as determined by qualified professional and technical persons, shall govern the treatment of an individual building site or parcel of land as a sensitive area. (Ord. 4365 § 9, 1979).

21.54.150 Sensitive areas – Permit issuance. A. Whenever a proposed development requires a building permit, grading permit, shoreline substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development, subdivision or short subdivision, and one or more of the sensitive areas, as defined in KCC 21.04, is present on the site of the proposed development, the manager of the building and land development division may require special studies by qualified professionals as provided in Sections 21.54.130 through 21.54.180. The manager shall send written notification to the applicant whenever such studies are required. The county may approve with conditions or deny any such proposal to carry out the purposes of this ordinance, the policies of the King County Comprehensive Plan, and other adopted county plans, policies and regulations.

B. Whenever an erosion hazard area, Class III seismic hazard area, or fish-bearing waters are present, soil,

geology, erosion and deposition, hydrology and/or water quality studies may be required if there is a reasonable possibility of significant erosion, landsliding, or seismic hazard or of damage to fish populations.

C. Any determination to require a study or any decision to approve with conditions or deny a building permit, grading permit, conditional use permit, variance, or short subdivision pursuant to this ordinance may be appealed in writing to the zoning and subdivision hearing examiner within ten days of written notification of such determination or decision. The hearing examiner shall hold a public hearing and consider the appeal pursuant to KCC Chapter 20.24; provided, that the decision of the hearing examiner regarding a requirement for studies shall be final. Any appeal filed pursuant to this section for actions relating to a building permit or short plat application shall be scheduled for public hearing and acted upon by the county as expeditiously as practicable.

D. Where studies may be required for building permit applications by an owner, lessee, or contract purchaser to construct a single family dwelling for his or her own use or applications for a short subdivision into two residential building lots, King County shall do a preliminary field investigation to determine the need for further studies or mitigating conditions. (Ord. 4365 § 10, 1979).

* * *

21.54.160 Sensitive areas – Wetlands. Wetlands located on the site of a proposed development requiring a building permit, grading permit, shoreline substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development,

subdivision or short subdivision shall not be disturbed or altered through excavation, filling, building, or other improvements unless King County determines, upon review of special studies completed by qualified professionals, that either:

A. the wetland does not serve any of the valuable functions of wetlands identified in section 20.12.080 and Army Corps of Engineers 33 CFR 320.4(b), including but not limited to wildlife habitat and natural drainage functions; or

B. the proposed development would preserve or enhance the wildlife habitat, natural drainage, and/or other valuable functions of wetlands as discussed in Section 20.12.080 or Army Corps of Engineers 33 CFR 320.4(b) and would be consistent with the purposes of this title. The required studies may include habitat value, hydrology, erosion and deposition, and/or water quality studies. Such studies shall include specific recommendations for mitigating measures which should be required as a condition of any approval for such development. The recommendations may include, but are not limited to, construction techniques, or design, drainage, or density specifications. The manager of the Building and Land Development Division may waive the requirement for special studies where sufficient information is otherwise available to approve, approve with conditions, or deny the development permit or approval in accordance with these criteria and the purposes of this title. If the application of this section would deny all reasonable uses of a property, development may be allowed which is consistent with the general purposes of this title and the public interest. (Ord. 4365 § 12, 1979).

* * *

EXHIBIT 2

W 20-21-4

SR to SE-P

This change in zone classification establishes a minimum lot size of 35,000 square feet. The following density factors apply to this area:

* The King County Sensitive Areas Study, along with field surveys, is a guide for determining which areas contain potential environmental problems and is an important factor in recommending density. Density Factor 2.a.

* The unique character of certain wetland areas in Federal Way is so precious to the present and future community that even a low density designation is not adquate [sic] to protect this asset from adverse effects of development. Thus, special provisions to prohibit or limit development in such areas are needed. Density Factor 2.b.

* A low density designation is considered as an additional means to limit the amount and rate of surface water runoff and soil erosion into the Green River Valley and within the Hylebos Creek Drainage basin. Density Factor 2.c.

* Existing lot size is an important factor in recommending density. Density Factor 3.d.

* The compatibility of adjacent land uses is an important factor in recommending density. Density Factor 3.e.

* Urban design and aesthetics are important to the community and affected by density. Low density designations are made in portions of

Federal Way as a means of protecting a rural character, preserving a visual image of trees and protecting the edges of the Federal Way community. Density Factor 3.g.

* The King County Comprehensive Plan's intent to consider neighborhood characteristics and community sentiment in determining the appropriate level of density is reaffirmed. (King County Comprehensive Plan, 1964, D. 8-9) Density Factor 4.a.

P-Suffix site conditions for this area are outlined below.

SR to SE-P, FR to FR-P, SE to SE-P

Because of the size and significance of the West Hylebos Headwater Wetland, a policy of the revised Federal Way Community Plan requires site plan review for any development within the rectangular area bounded by Pacific Highway South on the east, 348th Street South on the north, 1st Avenue South on the west and 356th Street South on the south. The following P-Suffix site development conditions apply:

1. 200 foot setback from the mean January high water mark or plus 10 feet elevation above the mean January high water mark, which ever is greater.
2. Natural vegetation within setback area to be kept.
3. No fill below the 210 foot contour line.
4. No sewer facilities, including lines serving adjacent areas, within area defined by the January high water mark.
5. Development upland of 210 foot contour line to use holding ponds and catch basins to keep runoff peak to current level and to trap pollutants. These ponds and catch

basins shall either be sufficiently biologically active to biodegrade the pollutants, or must be periodically cleaned.

EXHIBIT 3

* * *

B. SENSITIVE AREAS ARE IDENTIFIED AND PROTECTED

Federal Way has many unique natural features that serve important biological and cultural functions. Many of these areas are protected by the King County Sensitive Areas Ordinance, KCC 21.54. They include Class III Landslide Hazards, Class III Seismic Hazards, Erosion Hazards, Wetlands, Anadromous Fish-bearing Waters, 100-year Floodplains and Coal Mine Hazards. They are mapped in the *Sensitive Areas Map Folio* available at King county Planning Division offices. (The map folio generally locates those sensitive areas identified through an inventory process completed in 1981. On a case-by-case basis, further site investigation may be necessary to determine current conditions.) An example of a development condition reads as follows:

- There is a Class III Seismic Hazard area on portions of this property. Development of this property must follow the Sensitive Areas Ordinance, KCC 21.54.120 – KCC 21.54.180.

In addition to the generalized treatment of fish-bearing waters outlined above, the West Hylebos Creek system gets added attention. The major tributary of this creek flows through areas

of high intensity urban uses, such as manufacturing, as well as lower density residential areas. Protection is given to this stream using development setbacks (the standards applied are consistent with those used in other community planning areas). The development condition reads as follows:

- Preserve an undisturbed corridor not less than 30 feet from the normal water's edge on both sides of the stream or 20 feet from the top of the bank on both sides, whichever is greater. (The actual width of the setback varies and depends on the stream classification.)

HYLEBOS WETLAND #18 PROTECTION IS NECESSARY

Hylebos Wetland No. 18 is unique in many ways. Its protection has been a focal point of two planning efforts. For a detailed discussion of the wetland and the related policies, see chapter five of the Federal Way Community Plan.

The development conditions, in tandem with the surrounding land use concept, protect the integrity of the Hylebos wetland system and are vital to the maintenance of its unique qualities. The conditions were drawn from work on wetlands inventory, rating and protection methods currently being developed by the King County Planning Division's Resource Planning Section. (This work is aimed toward revising the Sensitive Areas Ordinance in order to distinguish among wetland types and provide King County's most important wetlands with more comprehensive protection). The property-specific application of the following development conditions are

found on the individual zoning maps. These conditions are as follows:

1. **Wetland Studies – Required**

   The Department of Planning and Community Development's director may require a special wetland study for development outside the Hylebos Wetland #18's required 100 foot buffer if the development may cause a wetland alteration or otherwise pose potential significant adverse impacts to wetland values and functions.

2. **Wetland Studies – Preparation and Contents**

   The wetland study shall be conducted by a biologist, botanist, plant ecologist or similarly qualified professional with the assistance, if required by BALD or SWM, of a professional engineer. Minimum requirements for identifying and mapping the wetland edge and the preparation and contents of the wetland study shall be contained in administrative guidelines prepared by the Department.

3. **Wetland Edge – identification**

   As a part of the required wetland study, the edge of the Hylebos Wetland #18 shall be identified using a transect or other accepted scientific method which is acceptable to the department; provided, the director is authorized to require a specific method to identify the wetland edge.

   The criteria for locating the wetland edge are based on the principle of predominance of wetland plants as set forth in the definition of wetlands which appears in KCC 21.04: "Wetlands areas inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances

do support, a prevalence of vegetation typically adopted for life in saturated soil conditions."

The wetland edge is the line around the wetland where the prevalence of hydrophytes, or wetland plants, ceases. For the purpose of defining the wetland edge, the prevalence of hydrophytes ceases where the combined percent of hydrophytes in the overstory, understory and ground cover is less than fifty percent.

4. **Protection and Recording**

   a. Those portions of the Hylebos Wetland #18 located within a proposed subdivision shall be protected as permanent open space by dedication to a home owner association, community or public body approved by the department director. For development subject to other permits, King County shall encourage protection of the Hylebos Wetland #18 as permanent easement, conservation easement or Native Growth Protection Easement, dedication or other alternative means acceptable to King County.

   b. Creation of new lots other than separate tracts dedicated or reserved as permanent open space shall not be permitted inside the Hylebos Wetland #18.

   c. As a condition of any permit approval, the applicant shall record, with the Records and Elections Division, on the title to the subject property or properties, a notice which alerts current and future property owners of the presence and location of the Hylebos Wetland #18, King County regulations which may apply to any future development and any conditions required by King County of the permit approval. The notice shall be on a form provided by the director.

5. **Wetland Buffer – Required**

   a. General Provisions

      1) The width of the buffer shall be determined by measurement which is perpendicular to the identified wetland edge at all points.

      2) The outside boundary of the buffer shall be surveyed and shown on all plats, short plats or PUDs.

   b. Minimum Buffer Width

      New development adjacent to the Hylebos Wetland shall preserve an undisturbed buffer not less than 100 feet wide.

   c. Increased Buffer Width

      The buffer's width shall be increased over the required 100 foot minimum when either of the following exist within or adjacent to the wetland buffer: 1) endangered, threatened or sensitive species; or 2) roads, utility rights-of-way, dikes, channels, etc. Provisions for increasing the buffer's width shall be contained in administrative guidelines prepared by the Department.

   d. Adjacent Stream Corridors

      New development adjacent to streams which enter or leave the Hylebos Wetlands shall preserve an undisturbed corridor, on the property subject to the applicable development permit, which is wide enough to maintain the natural hydraulic and habitat functions of that stream. Provisions for preserving adjacent stream corridors shall be contained in administrative guidelines prepared by the Department.

6. **Alteration**

Alteration of the Hylebos Wetland #18 and its required buffer is prohibited except for: 1) facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities; or 2) fences or other barriers necessary to protect wetland habitat.

7. **Enhancement – Required**

Alteration of the Hylebos Wetland #18 or its buffer for facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities shall not be permitted unless accompanied by a County-approved enhancement plan.

8. **Restoration – Required**

If the Hylebos Wetland #18 and/or its required buffer has been partially or totally altered without an approved development permit or in violation of the conditions of any applicable permit, complete restoration pursuant to an approved restoration plan shall be required. Restoration measures include, but are not limited to, removal of fill, regrading to original contours and revegetation of all cleared areas with native trees and/or plants which are necessary to replace wetland values and functions lost due to alteration. If information on wetland values and functions prior to alteration is not available, the department shall specify the criteria for restoration. Restoration shall be completed prior to approval of any development permits.

9. **Restoration and Enhancement Plans – Preparation and Contents**

Plans for wetland restoration or enhancement shall be prepared by a biologist, botanist, plant ecologist or similarly qualified professional with

the assistance of a professional engineer. The plan shall be jointly reviewed by the Building and Land Development and Surface Water Management Divisions. The State Departments of fisheries and Game may also be consulted, if considered necessary by the Department. Minimum requirements for preparation, contents and department evaluation of restoration and enhancement plans shall be contained in administrative guidelines prepared by the Department.

10. **Water Quantity and Quality**

The following provisions shall apply to the protection of water quantity and quality in the Hylebos Wetland #18:

a. Construction and operation of stormwater retention or detention facilities in the Hylebos Wetland #18 is prohibited;

b. The Hylebos Wetland #18 shall be protected from erosion and sedimentation by the use of erosion/sedimentation control practices and measures approved by the Surface Water Management Division;

c. In areas with no natural point of inflow (i.e., stream), any surface water directed toward the Hylebos Wetland #18 shall be directed and filtered through a drain field, or other appropriate technique used, to avoid erosion, sedimentation and excess nutrient inflow into the wetland;

d. The Hylebos Wetland #18 shall be protected from pollution by toxic wastes, petrochemical or other pollutants by the use of measures approved by the Surface Water Management Division which remove pollutants from surface water runoff water before it enters the wetland;

e. The velocity of stormwater runoff entering the Hylebos Wetland #18 shall be limited to pre-development levels;

f. In designated "critical areas" pursuant to K.C.C. 20.50, the Surface Water Management Division may recommend additional measures to minimize flooding, drainage or erosion problems;

g. Where possible, water level fluctuations in the Hylebos Wetland #18 shall be minimized during the spring breeding season (April through June).

11. **Endangered, Threatened and Sensitive Species – Protection**

Upon receipt of new information regarding the status or location of species designated by the federal government or Washington State as Endangered, Threatened or Sensitive, the director is authorized to require measures for protecting the species and its habitat. Provisions for protecting Endangered, Threatened and Sensitive Species shall be contained in administrative guidelines prepared by the Department.

12. **Human Access**

The following provisions shall apply to human access and interpretive use in the Hylebos Wetland #18:

* * *

EXHIBIT 4

Chapter 21.18
S-E
SUBURBAN ESTATE CLASSIFICATION

Sections:

21.18.010 Purpose of classification.
21.18.020 Permitted uses.
21.18.030 Lot area.
21.18.040 Lot area per dwelling unit.
21.18.050 Lot width.
21.18.060 Front yard.
21.18.070 Side yards.
21.18.080 Height.
21.18.090 Permissible lot coverage.
21.18.100 Placement of buildings.

21.18.010 Purpose of classification. The principal objective and purpose to be served by this classification and its application is to provide areas permitting uses and activities more rural in character than practical in the more concentrated urban areas and, at the same time, establishing and maintaining a living environment of high standard for single-family residential use. As a means to this end, substantial lot areas and yards and open spaces are required. (Res. 25789 § 900, 1963).

21.18.020 Permitted uses. In an S-E zone the following uses only are permitted and as hereinafter specifically provided and allowed by this chapter, subject to the off-street parking requirements and the general provisions and exceptions set forth in this title beginning with Chapter 21.46:

A. Any use permitted in the RS classification under the same conditions set forth in such classification, except

that the lot area, yard and open space requirements set forth in this classification shall apply.

* * *

21.18.030 Lot area. The minimum required area of a lot in an S-E zone shall be thirty-five thousand square feet. In a multiple lot subdivision approved subsequent to the effective date of the resolution codified herein, the minimum lot area shall be deemed to have been met if the average lot area is not less than thirty-five thousand square feet. In computing the average square foot area of lots in a subdivision not more than twenty-five percent of the number of lots may contain an area less than thirty-five thousand square feet and in no case shall a lot contain less than twenty-eight thousand square feet of area. For lots containing more than thirty-five thousand square feet of area not more than forty-two thousand square feet of area may be credited in determining the average. (Res. 33159 (part), 1967: Res. 25789 § 902, 1963).

21.18.040 Lot area per dwelling unit. In an S-E zone the lot area per dwelling unit shall be not less than thirty-five thousand square feet, except that in multiple lot subdivisions approved subsequent to the effective date of the resolution codified herein, the lot area per dwelling unit for each individual lot shall be the area of the individual lots conforming to the approved subdivision. (Res. 33159 (part), 1967: Res. 25789 § 903, 1963).

21.18.050 Lot width. In an S-E zone every lot shall have a width of not less than one hundred thirty-five feet. (Res. 25789 § 904, 1963).

21.18.060 Front yard. In an S-E zone every lot shall have a front yard with a depth of not less than thirty feet. (Res. 25789 § 905, 1963).

21.18.070 Side yards. In an S-E zone every lot shall have a side yard on each side of the lot which side yard shall have a width of not less than ten feet. (Res. 25789 § 906, 1963).

21.18.080 Height. In an S-E zone no building or structure shall exceed a height of thirty-five feet, except for agricultural buildings as set forth in the general provisions. (Res. 25789 § 907, 1963).

21.18.090 Permissible lot coverage. All buildings and structures including accessory buildings and structures and any areas used to provide parking space, shall not cover more than thirty-five percent of the area of the lot. (Res. 25789 § 908, 1963).

* * *

EXHIBIT 5

* * *

Chapter 21.08
RS SINGLE-FAMILY DWELLING CLASSIFICATION

Sections:

21.08.010 Purpose of classification.
21.08.020 Permitted uses-Primary residential.
21.08.030 Permitted uses-Accessory residential.
21.08.040 Permitted uses-Primary nonresidential.
21.08.050 Permitted uses-Accessory nonresidential.
21.08.060 Conditional uses.
21.08.062 Administrative conditional uses.
21.08.070 Utilities.
21.08.080 Lot area.
21.08.090 Lot area per dwelling unit.
21.08.100- Lot width.
21.08.110 Front yard.
21.08.120 Side yards.
21.08.130 Height.
21.08.140 Permissible lot coverage.
21.08.150 Placement of buildings and structures.
21.08.160 Limitations on use.
21.08.170 Homeowner's Association contract.

21.08.010 Purpose of classification. The principal objective and purpose to be served by this classification and its application is to create a living environment of the highest standards for single-family dwellings. Other related uses contributing directly to a complete living environment are considered compatible and therefore also permitted. A further related consideration is to make it possible more efficiently and economically to design, install and maintain all physical public service facilities in

terms of size and capacity to adequately and permanently meet needs resulting from a defined intensity of land use. (Res. 25789 § 400, 1963).

* * *

21.08.040 Permitted Uses – Primary nonresidential. The following nonresidential uses only are permitted outright in an RS zone, subject to the off-street parking requirements, landscaping requirements, and the general provisions and exceptions set forth in this title beginning with Chapter 21.46, and subject to the provisions of the King County shoreline management master program where applicable:

A. Art galleries and museums, when located in a public park or on a public or private school site;

B. Cemeteries which were legally in existence prior to the effective date of the adoption of this title;

C. Churches, providing the following conditions are conformed to:

1. All buildings and structures on the site shall not cover more than forty percent of the area of the site.

2. Buildings and structures on the site shall not be closer than thirty feet to any property line, except that a detached one-family dwelling on such site need conform only to the yard requirements and required distance between buildings as prescribed for residences by this chapter.

3. The height limits of the RS classification shall apply, except that the height shall be measured to the mean height of the roof.

4. On interior lots, the required side yards may be used to provide off-street parking areas and on corner lots the interior side yards may be similarly used. Under no circumstances may the required front yard or the side yard on the side street be used for off-street parking.

5. All lights provided to illuminate any parking area or building on such site shall be so arranged as to direct the light away from any adjoining premises.

6. Church sites shall abut and be accessible from at least one public street having two moving traffic lanes and a dedicated width that will permit not less than thirty-six-foot roadway.

7. The following signs only are permitted:

a. One sign area, lighted or unlighted, on the outside wall of the main building and parallel thereto, having an area not greater than forty square feet;

b. A detached sign having an area of not more than twenty square feet and on which both faces may be utilized, such being securely mounted on the ground on supports and the top of which sign shall be not more than six feet above the natural level of the ground upon which it rests. On corner and reverse corner lots one such sign may be placed facing each street;

c. A detached readerboard sign having an area no greater than fifty square feet, lighted or unlighted, and on which both faces may be utilized.

8. For purposes of determining conformance to the foregoing conditions and the parking requirements, a plot plan showing ultimate location and use of all buildings, location of signs, location and amount of off-street parking areas, location and adequacy of ingress to and egress from parking areas, landscaping and sketches to

scale showing the building elevations and floorspace to be devoted to seating or assembly purposes, shall be filed with and approved by the building and land development division prior to the issuance of any building permit and thereafter the issuance of any building permits shall be governed by and conform to the approved plot plan. If later, a modified plot plan is submitted, the modified plan shall conform to the conditions and requirements of this title or any amendments in effect at the time the modified plan is submitted:

* * *

21.08.080 Lot area. In recognition of the variations in topographical conformation and geographical relationships of portions of King County and the advantages that can attach to living conditions, including considerations of health, safety and general welfare and the amenities of living which naturally relate to the areas devoted to residential and related purposes, there are established in the RS classification four minimum required lot areas required as set forth herein and, as to location, are identified on the zoning map by the designations RS-15,000, RS-9600, RS-7200 and RS-5,000:

A. The minimum required area of a lot in an area designated as RS-15,000 shall be fifteen thousand square feet.

B. The minimum required area of a lot in an area designated as RS-9600 shall be nine thousand six hundred square feet.

C. The minimum required area of a lot in an area designated as RS-7200 shall be seven thousand two hundred square feet.

D. The minimum required area of a lot in an area designated as RS-5000 shall be five thousand square feet.

In multiple-lot subdivisions and short subdivisions approved subsequent to the effective date of this title, the minimum lot area shall be deemed to have been met if, either: A. the average lot area, or B. the area in lots plus the area designated for permanent open space or recreational uses divided by the total number of lots is not less than the minimum lot area requirement of the zone in which the property is located as identified on the zoning map. Said open space or recreation area may be accepted for dedication to King County at the county's option and only if the property's size and features meet adopted King County open space and park acquisition standard, or may be owned in undivided interest by the residents of the subdivision, who shall be responsible for any required maintenance. In either case, the subdivider shall remove or eliminate all hazardous conditions such as construction debris, dead trees or abandoned mine workings within the designated area prior to final plat approval. If the property is being dedicated, the Parks Division may require additional improvements.

E. Subdivisions or short subdivisions in which lot size averaging, lot clustering or the flexible setback provisions of Ordinance 4304 are used shall meet the following criteria:

1. All building lots must be capable of meeting off-street parking requirements and be capable of accommodating residences which meet sewerage disposal and building code requirements. No more than one hundred thirty-five percent of the minimum required lot area may be credited to any oversized lot when calculating average

lot area, and no oversized lot used for lot averaging may be further subdivided;

2. Common open space areas may not be computed to include any submerged land unless part of a planned unit development as provided in Chapter 21.56;

3. At least fifty percent of the common open space area must be usable for active recreation (i.e. have a slope of not more than five percent), free of hazardous conditions, and dry (i.e. above the one-hundred-year floodplain) unless it consists of a valuable natural feature, preservation of which is consistent with adopted county policies;

4. When adjacent dwelling units are attached, the aggregate structures' design and location with respect to yards and common open space shall be consistent with established neighborhood character and scale;

5. If site contours permit, lots must allow potential orientation of building for maximum winter solar heat gain, and minimum obstruction of other buildings' solar access;

6. The Building and Land Development Division may require typical plot plans and building elevations prior to final plat or short plat approval, and may condition the location and design of structures to accomplish the purposes of this section;

7. Slight variations from the requirements of this subsection may be authorized by the director when not inconsistent with their intent and purpose.

F. All normal lot area and lot dimension requirements shall apply to lots proposed to be created through a subdivision or short subdivision unless King County determines that a proposed modification of normal

requirements through lot size averaging or lot clustering or the flexible setback provisions of Ordinance 4304 and K.C.C. 21.48 is consistent with the purposes of this title and county subdivision regulations, and the criteria set forth in this section. King County shall deny or modify any proposed variation from normal lot area and lot dimension requirements within a subdivision or short subdivision as necessary to accomplish the purposes of this section, and to minimize adverse impacts on adjacent properties. (Ord. 4667 § 1, 1979: Ord. 3144 § 8 (part), 1977: Ord. 1887 § 1, 1974; Res. 36363 (part), 1968: Res. 25789 § 402, 1963).

21.08.090 Lot area per dwelling unit. The lot area per dwelling unit shall be no less than the minimum area of a lot as required for the zone in which the property is located as identified on the zoning map, except that in multiple-lot subdivisions approved subsequent to the effective date of this title,* the lot area per dwelling unit for each individual lot shall be the area of the individual lots conforming to the approved subdivision.

In the case of a permitted transitional two-family dwelling, the lot area per dwelling unit shall be not less than one-half of the minimum required area of the lot. If a lot has less than seven thousand two hundred square feet, the lot area per dwelling unit for a transitional use shall be not less than three thousand square feet. (Ord. 4667 § 2, 1979: Ord. 3144 § 8 (part), 1977; Res. 25789 § 403, 1963).

[* See Section 21.70.010.]

21.08.100 Lot width. Every lot in an RS zone shall maintain a width of not less than the following:

A. The minimum width of a lot in an area designated as RS-15,000-eighty feet;

B. The minimum width of a lot in an area designated as RS-9600-seventy feet;

C. The minimum width of a lot in an area designated as RS-7200-sixty feet;

D. The minimum width of a lot in an area designated as RS-5000-forty feet. (Ord. 4667 § 3, 1979: Ord. 3144 § 8 (part), 1977; Res. 25789 § 405, 1963).

21.08.110 Front yard. Every lot in an RS zone shall have front yards with a depth of not less than twenty feet, except on key lots and transitional lots this depth may be reduced to fifteen feet. (Ord. 3144 § 8 (part), 1977; Res. 25789 § 405, 1963).

21.08.120 Side yards. In an RS zone every lot shall have a side yard on each side of the lot, which side yard shall have a width of not less than five feet. (Ord. 3144 § 8 (part), 1977: Res. 25789 § 406, 1963).

21.08.130 Height. In an RS zone no residential building or structure shall exceed a height of thirty feet. Any other building or structure may exceed such height limit; provided each required side yard and open space is increased one additional foot in width for each additional foot in height such building or structure exceeds thirty feet; and provided, further, that a site occupied by a building or structure having a height greater than thirty feet shall have no property alienated from such site which would reduce the yards and open spaces required or provided to compensate for the greater height, nor

which would reduce the total required minimum area of the site upon which the permitted lot coverage was based. In no case, however, may a building or structure exceed a height of fifty feet, except for church steeples and the like as provided in Section 21.48.030. If a parcel contains an area two or more times, but not more than four times, the minimum required lot area for the area district in which the property is located as identified on the zoning map, then the portion of the parcel committed to the building site, including the additional yards, and open spaces provided to compensate for the greater height of buildings, shall be accurately defined as a separate lot by means set forth in the subdivision code for platting or dividing property. (Ord. 3144 § 8 (part), 1977: Res. 25789 § 407, 1963).

21.08.140 Permissible lot coverage. A. Except as otherwise provided for schools and churches, all buildings, including accessory buildings and structures, but not including any open areas used to provide parking spaces or private swimming pools, shall not cover more than thirty-five percent of the area of the lot. In the case of churches and schools, the limitation of lot coverage shall pertain to buildings and structures only and does not include open air parking areas.

B. In subdivisions or short subdivisions where lot size averaging, lot clustering or the flexible setback requirements of K.C.C. 21.48.270 are used, residential lot coverage shall be limited to thirty-five percent of the minimum lot area of the zone classification, except that the lot coverage provisions of the RT zone shall apply to lots developed with townhouses. (Ord. 6067 § 2, 1982:

Ord. 4667 § 4, 1979: Ord. 3144 § 8 (part), 1977; Res. 25789 § 408, 1963).

* * *

APPENDIX C

SUMMARY JUDGMENT MOTION SET FOR:
Wednesday, April 20, 1988

SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, a Washington corporation, Plaintiff, v. KING COUNTY, Defendant.	NO. 87-2-07034-4 AFFIDAVIT OF DYANNE SHELDON

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Dyanne Sheldon, being first duly sworn on oath deposes and states as follows:

1. I am the Wetlands Planner for the Building and Land Development Division of King County. In this position my primary responsibility is to review permit applications concerning their environmental impacts on wetlands. I am also responsible for identifying wetland boundaries and conducting environmental studies. I make this affidavit on my own personal knowledge.

2. I have worked as a professional wetland biologist in the Pacific Northwest since 1981. Prior to that I was Director of an Environmental Education Center which focused its attention on a 150 acre marsh/forest complex in the upper Midwest.

3. In 1981 King County conducted an inventory of the wetlands located in the Western one-half of King County. The inventory was conducted pursuant to the King County sensitive areas ordinance, King County Code 21.54 which was enacted in 1979. The purpose of the sensitive areas ordinance is to determine areas of special concern and to supplement the development requirements in the zoning code by providing for additional controls in critical sensitive areas. Wetlands are identified by King County as a critical sensitive environmental area. Pursuant to King County Code 21.54.170:

> "Wetlands located on the site of a proposed development requiring a building permit, grading permit; shorelines substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development, subdivision or short subdivision *shall not be disturbed or altered through excavation, filling, building, or other improvements unless King County determines, upon review of special studies completed by qualified professionals, that either:*
>
> (a) The wetland does not serve any of the valuable functions of wetlands identified in Section 20.12.080 in Army Corps of Engineers 33 CFR 320.4(b), including but not limited to wildlife habitat and natural drainage functions;
>
> (b) proposed development would preserve or enhance the wildlife habitats natural drainage, and/or other valuable functions of wetlands . . . "(Emphasis added.)

4. The term "wetland" is defined in the King County Code, Section 21.04.920 as follows:

> "Wetlands means those areas of King County that are inundated or saturated by ground or

> surface water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. (Army Corps of Engineers Regulation CFR 323.2(c)). (Ord. 4365 § 6, 1979).

5. Essentially, a wetland is a swamp, marsh or bog that supports vegetation typically adapted for life in saturated soil conditions. Factors such as hydrology and soils influence the presence of hydrophytes (a technical term used for plants which are adapted for life in a saturated environment). The presence of specific vegetation of plant communities is often the clearest indicator of the existence of a wetland.

6. Habitat value is related to the diversity of the vegetation present in the wetland. The more diverse the vegetation, the more complex the habitat provided. Complexity encompasses both the variety dimension and spatial pattern of vegetation and subsequent wildlife usage. Complex wetland systems provide a variety of "niches". Niches are places which provide all the critical habitat components for a particular species. For example, Canada geese require open water, emerent wetlands for food sources, and upland (dry) sites for nest building. Every species has its particular specific needs which define its niche. These niches must provide mating, breeding and rearing sites as well as locations for spawning in the case of fisheries.

7. Wetland areas are primary habitat for waterfowl such as ducks, geese and shorebirds. Other forms of

wildlife, such as fish, mink, coyote, raccoon and amphibians rely on the wetland for their survival, as well. For example, salmon often spawn in the marshy channels of a wetland and the wetland provides seasonal recharge to streams which are critical for fisheries survival.

8. If the wetland area is diminished and/or eliminated, the niches are destroyed. As a consequence, wildlife habitat is eliminated and therefore wildlife populations are reduced. Elimination of habitat will lead to the reduction and demise of wildlife. Accordingly, the environmental effects of habitat elimination have consequences beyond the immediate impact site.

9. Hylebos Wetland No. 18 is rated a Class #1 unique and outstanding in King County's wetland inventory. It is one of the last major wetlands in Federal Way and is of major significance in King County. Wetlands are rated No. 1 if there is the presence of species recognized by the federal government or the State of Washington as rare, endangered, or threatened and the wetland is a sensitive or outstanding potential habitat for such species.

10. The Hylebos No. 18 Wetland is a very old, complex wetland system as indicated by its soils, vegetation and forested area comprised of mature timber. Wetland age can often be roughly estimated by the depth of organic soil (peat) present on site. George Rygg wrote in the book "Peat Resources of Washington State", that it takes approximately 100 years to accumulate *one inch* of organic peat soil. The peat soils in the Hylebos No. 18 Wetland are of undetermined depth (i.e. deeper than 10 feet in the central portion) – meaning the wetland is

extremely old and has been an influencing factor in land use for many generations.

11. The Hylebos No. 18 Wetland contains an old bog system which makes it quite unique and unusual from a biological standpoint. Bogs have an inherent value because of their uniqueness. They form differently than a cat-tail marsh which has a mineral soil basis. Bogs begin without organic soil, but over time deep peat deposits are formed from accumulated dead plants. These peat deposits can reach depths of 50 to 100 feet or more over the milenia. Hylebos No. 18 Wetland contains a cedar bog, in other words old growth cedar has become established above the saturated peat soils. It is one of the few still in existence in the Pacific Northwest.

12. The development of the property that surrounds the Hylebos No. 18 Wetland is of great environmental concern to citizens in the Federal Way community and King County. In the 1980 Federal Way Community Plan and Area zoning policies and development conditions were adopted to protect the Hylebos Wetland. Again when the Federal Way Community Plan update process was commenced in 1984 policies and development conditions were proposed by the King County Executive and were a major topic during the process. A final plan was approved by the King County Council in September of 1986. In September 1986, the King County Council adopted Ordinance No. 7746; the Federal Way Community Plan and Area Zoning. I worked on formulating the development conditions to protect the Hylebos wetland No. 18 for the 1986 plan. The sole purpose of these conditions is to protect the environment associated with Hylebos No. 18 Wetland and Hylebos Creek.

13. Ordinance No. 7746 contains policies and 12 development conditions to protect the Hylebos Wetland. These are applicable to all parcels which are adjacent to or contain the Hylebos No. 18 Wetland. The first requirement is that the wetland edge be determined by BALD. The wetland boundary identified in the 1986 plan is an approximation only. It is based on the field worth of six regional wetland experts who coordinated the edge deliniation of the Hylebos No. 18 Wetland. The mapping provided by the County is an approximation because the cost of an actual survey was not provided for. A subsequent condition requires a 100-foot buffer surrounding the entire wetland edge. A minimum of 100 foot buffer from the wetland edge is necessary to maintain the integrity and functioning of the wetland environment. This 100-foot buffer is an integral element in the preservation and protection of the Hylebos No. 18 Wetland and acts as an interface between the wetland and upland (dry area). The buffer helps to maintain habitat diversity, improves water quality entering the wetland, and attenuates the impacts from human activities, domestic animals and other physical intrusions. Without it habitat value of the wetland would be diminished, water quality impacts would more likely occur, and physical intrusions by human and domestic animals would be more prevalent.

14. I have reviewed the complaint filed by the plaintiff in this lawsuit and the Declaration of R. W. Thorpe. The Hylebos Wetland No. 18 is located on approximately one-third of plaintiff's property. This wetland has been present for a long time though the property in question may have had various other land uses such as agricultural fields. Agricultural use in old wetlands is

common as the deep organic soils provide perfect field (crop) conditions. Prior to the adoption of Ordinance 7746, SEPA and King County's sensitive areas ordinance would have applied to any development. From 1980 to 1986 the 1980 Federal Way Community Plan and Area Zoning development conditions to protect the wetland would have applied. These conditions allowed no fill below the 210 foot contour line and required a 200 foot buffer from the "mean January highwater mark" which was interpreted as the wetlands edge. The 1980 development conditions to protect the Hylebos Wetland are far more restrictive than the 1986 development conditions.

15. Mr. Thorpe assumes that the 100 foot buffer line is accurate, though he states that the wetland boundary is unknown. He also states that the proposed five lot subdivision is a feasible use of the property in question. However, that plat design totally ignores the acknowledged presence of the Hylebos No. 18 Wetland, regardless of the 100 foot buffer requirement. The development scheme fails to include requirements of the Zoning Code regarding traffic and access, as well as the state mandated SEPA requirements for the protection of sensitive areas.

As no accurate wetland study or deliniation was requested from BALD, the effects of the 100 foot buffer are unknown. And, as no actual application for development of this parcel has been made there can be no determination of taking as no proposed use has been denied.

16. The implication by Mr. Thorpe in his declaration that a 100 foot buffer is a minimum and that the buffer could be expanded at will is misleading. The buffer would only be expanded to protect the presence of

known rare, endangered, or threatened species as identified Federally or by the State of Washington. As none of these species occur within the vicinity of the subject property the buffer would not be expanded beyond the recommended 100 feet.

/s/ Dyanne Sheldon
DYANNE SHELDON

SUBSCRIBED AND SWORN TO before me this 13 day of April, 1988.

/s/ Ann Schindler
Notary Public in and for the State of Washington residing at Kitsap County.
My Commission Expires:
1988 June.